IN THE SUPREME COURT OF FLORIDA

IN RE FINAL REPORT OF THE JURY INNOVATIONS COMMITTEE	))	Case No.:

RESPONSE BY THE FLORIDA CIVIL PROCEDURE RULES COMMITTEE TO THE FINAL REPORT OF THE JUDICIAL MANAGEMENT COUNCIL'S JURY INNOVATIONS COMMITTEE

Robert N. Clarke, Jr., Chair of the Civil Procedure Rules Committee ("Committee") of The Florida Bar, and John F. Harkness, Jr., Executive Director of The Florida Bar, submit this response proposing changes to the Florida Rules of Civil Procedure.

In a letter to the Committee dated October 17, 2003 (see Appendix D), the Supreme Court requested that the Committee consider 13 of the recommendations made by the Judicial Management Council's Jury Innovations Committee. The Committee has studied the recommendations and makes the following responses, which are discussed in detail below:

A. Recommendation 7 (Jury Voir Dire Questionnaire) – A new jury questionnaire is proposed, to replace the questions in form 1.984.

B. Recommendation 9 (Expedited Trials) – The Committee recommends no changes.

C. Recommendation 13 (Pre-voir Dire Judicial Statements) – The Committee recommends no changes.

D. Recommendation 14 (Pre-voir Dire Opening Statements by Attorneys) – The Committee recommends no changes.

E. Recommendation 16 (Questions by Jurors) – The Committee proposes new rule 1.452.

F. Recommendation 17 (Discussion of Evidence Prior to Deliberations) – The Committee recommends no changes.

G. Recommendation 21 (Deposition Summaries) – The Committee recommends no changes.

H. Recommendation 22 (Expanding the Use of Depositions in Civil Cases — 100 Mile Rule) – The Committee recommends no changes.

I. Recommendation 23 (Juror Notebooks) – The Committee proposes amendments to rule 1.200(b) and a new rule 1.455.

J. Recommendation 26 (Written Jury Instructions) – The Committee proposes amendments to rule 1.470(b).

K. Recommendation 31 (Final Instructions Before Closing Arguments) – The Committee proposes amendments to rule 1.470(b).

L. Recommendation 33 (Read-back of Testimony) – The Committee recommends no changes.

M. Recommendation 35 (Less than Unanimous Verdicts) – The Committee recommends no changes.

A. Recommendation 7 (Standardized Juror Questionnaires)

Civil Procedure Rules Committee Action: The Committee recommends, by a vote of 35-0, replacing the existing questions in form 1.984 with a new questionnaire.

Background: Recommendation 7 states as follows:

> Pre-voir dire questionnaires are desirable and beneficial. Model questionnaires should be developed for both civil and criminal cases, enabling lawyers to have a preview of jurors' backgrounds. In-court voir dire can then be limited to case-specific inquiries (subject to reasonable time limitations imposed by the court) and any follow-up questions necessary to clarify written answers.

Committee Analysis and Comments: The Committee sought to create a clarified list of questions for use by the court prior to voir dire to elicit general information

from jurors within the confines of existing case law. The Committee gathered and reviewed questionnaires from different circuits in Florida. Most of the questionnaires were substantially the same. The questionnaire provided is considered to be a general starting point for all trials, but not exhaustive, because attorneys can expand on the questions. Each trial must be analyzed on its own merits and additional areas of inquiry allowed as the court deems appropriate upon the request of the parties. The proposed new questionnaire, to replace the questions in existing form 1.984, is in Appendix B.

B. Recommendation 9 (Expedited Trials)

Civil Procedure Rules Committee Action: The Committee recommends no change, by a vote of 34-0.

Background: Recommendation 9 states as follows:

> When used properly, expedited trials can be a useful tool to save jurors' time. A newly enacted but underutilized provision, section 45.075, Florida Statutes, establishes the procedures for expedited civil trials, that is, trials which must be limited to one day, but may involve a jury. In order to encourage the use of expedited jury trials, attorneys should be required by court rule to notify their clients in writing of the applicability of the expedited trial procedure. In addition, the attorney should be required to file a statement with the court that this notice has been provided to the client.

Committee Analysis and Comments: In addition to the discussion in the Jury Innovations Committee report, the Committee reviewed and discussed § 45.075, Fla. Stat., titled "Expedited trials," which allows a court to conduct an expedited trial as provided in that section. It was not part of the Committee's assignment to determine whether this statute was procedural or substantive or constitutional; accordingly, the Committee takes no position on that issue. There was significant discussion among Committee members, who include judges as well as trial attorneys, in regard to what type of cases would be suited for this expedited trial procedure. The Committee agreed that whether an expedited trial would be appropriate in a case would depend on a multitude of factors, including the facts of the case, the issues involved, the number of witnesses, the extent of the damage, the number of documents involved, the complexity of the case, and a myriad of

other factors which are case specific. In general, if a case could be submitted for a one-day expedited trial, it would often be disposed of by summary judgment or resolved during mediation. It would appear that few, if any, cases would lend themselves to a one-day expedited trial where each party has no more than three hours to present its case, including the opening, all testimony and evidence, and the closing.

The Committee considered whether requiring client notification of expedited trials would be of any benefit to the court and the litigants. Committee members agreed that expedited trials would not be appropriate in all civil cases. In fact, based on the discussions and experience of the Committee members, very few cases would be appropriate for expedited trials. The determination of whether an expedited trial is appropriate is based on a myriad of other factors, primarily the complexity of the issues in the case, and providing notice to the client would not alter that decision. In other words, notice does not play a significant part in the determination of whether to submit a case for an expedited trial as defined by the statute.

Requiring notification would needlessly increase the cost of litigation. Notifying clients of the expedited trial proceeding when the case is not appropriate for an expedited trial would cause client confusion and would waste the time of the attorney, client, and court. Filing affidavits in the court stating that clients have been notified of an expedited trial procedure would increase the time, effort, and cost of the clerk of court and, thereby, court administration.

Further, the Committee discussed what ramifications, if any, there should be if notification were required but an attorney did not give notification. The Committee considered whether there would be any harm to the court, the litigants, or the jurors. Given that in the majority of civil cases expedited trials would not be appropriate, the Committee did not feel that it would be advisable to sanction attorneys for not providing notice in cases which would not lend themselves to expedited trials. Further, it would be impracticable to craft a rule to tell an attorney in which cases notice should be given. This decision is better left to the professional judgment of the attorney handling the case in consultation with the client.

In sum, the Committee was unable to ascertain a substantial benefit to having a rule requiring client notification verified by an attorney's affidavit. The use or non-use of an expedited trial does not hinge on client notification but,

instead, is determined by factors inherent in the complexity and issues associated with a particular case. The Committee agrees that expedited trials, when used appropriately, can be a useful tool not only to jurors but also to the court. Although most, if not all, attorneys who handle litigation should be familiar with § 45.075, Fla. Stat., the Committee believes that if there is a lack of knowledge of this statute, education through CLE would be a viable alternative.

Accordingly, for the reasons set forth above, the Committee recommends no rule change in response to Recommendation 9. The Committee specifically recommends no rule requiring Notification of Clients Regarding Expedited Trials or Affidavits of Client Notification.

C. Recommendation 13 (Pre-voir Dire Judicial Statements)
and
D. Recommendation 14 (Pre-voir Dire Opening Statements by Attorneys)

Civil Procedure Rules Committee Action: It is the decision of the Committee, by a 34-0 vote, that no new rules are needed in either instance.

Background: Recommendation 13 states as follows:

> To encourage citizen participation in the jury system, judges should be permitted and encouraged to give brief pre-voir dire statements outlining the basic nature of the case. This will increase juror interest in serving on the jury and reduce the number of jurors requesting dismissal from service.
>
> Recommendation 14 states as follows:
>
> Judges should be encouraged to allow attorneys to make brief mini-opening statements to jurors *before* voir dire begins.

Committee Analysis and Comments: The Committee felt that judges already have the inherent power to provide pre-voir dire case summaries to the jury and that such presentations should be handled on a case-by-case basis after discussion with the attorneys. As to the suggestion that attorneys should have such an opportunity, it was felt that opening and closing statements were sufficient for counsel of record to present their views of the case.

E. Recommendation 16 (Questions by Jurors)

Civil Procedure Rules Committee Action: The Committee recommends, by a vote of 45-5, adopting a new rule 1.452.

Background: Recommendation 16 states as follows:

> Jurors in both civil and criminal trials should be permitted to submit to the judge written questions to be asked of witnesses by the judge. The judge has the discretion to determine which jury questions are to be asked of witnesses. The Supreme Court should incorporate this right into the rules of civil and criminal procedure.

Committee Analysis and Comments: In addition to the discussion in the Jury Innovations Committee report, the Committee also considered Florida case law, 24 FLA. JUR. 2D *Evidence and Witnesses* § 826, and the Arizona rule, which states:

> Jurors shall be permitted to submit to the court written questions directed to witnesses or to the court. Opportunity shall be given to counsel to object to such questions out of the presence of the jury. Notwithstanding the foregoing, for good cause the court may prohibit or limit the submission of questions to witnesses.

Rule 39(b)(10), Arizona Rules of Civil Procedure.

The members of the Committee who participated in the discussions unanimously agreed that there should be a rule embodying the procedure for jurors to ask questions of witnesses. Even though § 40.50(3), Fla. Stat., states that the court "shall" permit jurors to submit such questions, it is the strong recommendation of the Committee that the rule should be permissive rather than mandatory.

The proposed new rule submitted by the Committee is in Appendix B.

F. Recommendation 17 (Discussion of Evidence Prior to Deliberations)

Civil Procedure Rules Committee Action: The Committee, by a vote of 45-1, opposes the Recommendation and proposes no rule change.

Background: Recommendation 17 states as follows:

> Jurors in civil trials only should be instructed that they are permitted to discuss the evidence in the jury room during recesses from trial, when all jurors are present, as long as they reserve judgment about the outcome of the case until deliberations commence. The Supreme Court should incorporate this right in the rules of civil procedure and/or the standard jury instructions for civil cases. Extension of this innovation to the criminal area should await further study in light of the significant constitutional rights which could be affected.

In his directive to the Committee on all of the Recommendations, Justice Anstead wrote with regard to Recommendation 17:

> Although a majority of the Court voted against implementation of recommendation 17, which would allow jury deliberations prior to verdict in civil cases only, the Court refers this proposal in the event the committee concludes the proposal merits further consideration by the Court. If the committee favors [recommendation 17], its report should contain proposed rules implementing [that recommendation].

Committee Analysis and Comments: The Committee discussed Recommendation 17 keeping in mind that the justices of the Supreme Court were themselves divided on the subject. The Committee was also advised that the Supreme Court Committee on Standard Jury Instructions in Civil Cases had considered the Recommendation and had voted unanimously to oppose it. Further, it was learned that the Criminal Procedure Rules Committee had reviewed the Recommendation and opposed it with little debate.

Based on the above and some other serious concerns, the Committee voted unanimously to oppose this recommendation. The discourse on the Recommendation was brief as there was an overwhelming feeling that allowing such discussions would create more problems than it would provide assistance to the jury, court, and parties as deliberations got underway. Some concerns raised included:

1) It would be difficult to establish a fair method for such discussions that would ensure full participation by all jurors.

2) It would not be productive for the jurors to discuss the case and relevant issues before receiving instruction on the law of the case.

3) It would create a "slippery slope."

4) Such discussions would have a critical impact on the ability of jurors to ask questions during the trial.

G. Recommendation 21 (Deposition Summaries)

Civil Procedure Rules Committee Action: The Committee, by a vote of 43-0, recommends no change to the rules.

Background: Recommendation 21 reads as follows:

> Deposition summaries may be used in civil trials. However, their use in criminal proceedings should not be permitted.

Committee Analysis and Comments: The Committee considered Rule 32, Arizona Rules of Civil Procedure, and the comment thereto which states:

> **(a). Use of Depositions**.
>
> At the trial or at any hearing any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, and had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. The party who seeks admission of said testimony by deposition may do so without proof of the deponent's unavailability to testify at trial. Nothing contained in this Rule shall be construed to limit, in any way, the right of any party to call the deposed witness to testify in person at trial.
> If only part of a deposition is offered in evidence by a party, the court may require the offeror to introduce contemporaneously any other part which ought in fairness to be considered together with the part introduced.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action has been brought in any court of the United States or of any state, and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefore. A deposition previously taken may also be used as permitted by the Arizona Rules of Evidence.

(b). Objections to Admissibility.

Subject to the provisions of Rules 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c). Form of Presentation.

A party offering deposition testimony may offer it in the form permitted by Rules 30(b)(4) and 30(c). If deposition testimony is offered in any form for any purpose, the offering party shall provide the court with a transcript of the portions offered. In cases tried before a jury, if deposition testimony is to be offered for purposes other than impeachment and is available in non-stenographic form, it shall be presented to the jury in that form unless the court for good cause orders otherwise.

(d). Effect of Errors and Irregularities in Depositions

(1) *As to notice*. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) *As to disqualification of officer*. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or

could be discovered with reasonable diligence.

(3) *As to Taking of Deposition*.

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(D) Objections to the form of the question or responsiveness of the answer shall be concise, and shall not suggest answers to the witness. No specification of the defect in the form of the question or the answer shall be stated unless requested by the party propounding the question. Argumentative interruptions shall not be permitted.

(E) Continuous and unwarranted off the record conferences between the deponent and counsel following the propounding of questions and prior to the answer or at any time during the deposition are prohibited. This conduct is subject to the proscriptions of Rule 32(d)(3)(D) and the sanctions prescribed in Rule 37.

(4) *As to completion and return of deposition*. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

STATE BAR COMMITTEE NOTE
1970 Amendment

Rule 32: The 1970 revision collects in one place the materials on use of depositions in court proceedings, which had previously been in Rule 26(d), (e), and (f), putting them together with what had previously been in Rule 32 on the effect of errors and irregularities in depositions. The change in Rule 32(a) would be permitted if the witness were then present and testifying, accords with *Skok v. City of Glendale*, 3 Ariz.App. 254, 257, 413 P.2d 585 (1966), which holds that insofar as admissibility may be affected by changing events, it is the status of the matter at trial which is controlling. A deposition may be read even though the party is in court, *Southern Pac Co. v. Cavallo*, 84 Ariz. 24, 323 P.2d 1 (1958), though it will not be reversible error if in all the circumstances the trial court directs live testimony. *Han v. Horwitz*, 2 Ariz.App. 245, 407 P.2d 786 (1965). The deposition is admissible to challenge inconsistent statements. *Bogard G.M.C. Co. v. Henley*, 92 Ariz. 107, 374 P.2d 660 (1962).

Use of depositions of witnesses, as distinguished from parties, remains somewhat more restricted, and the requirements of § 32(a)(3) must be met. If a deposition is offered under that provision, any necessary record must be made in the trial court to show the foundation, as, for example, absence; *Skok v. City of Glendale*, 3 Ariz.App. 254, 258, 413 P.2d 585 (1966); *Slow Development Co. v. Coulter*, 88 Ariz. 122, 130, 353 P.2d 890 (1960) (foundations held adequate though not detailed in opinion). A claim of self-incrimination at trial has been held an "exceptional circumstance" warranting use of a deposition, *Union Bank v. Safanie*, 5 Ariz.App. 342, 349, 427 P.2d 146 (1967).

In Sec. 32(a)(4) a somewhat greater measure of discretion in application is suggested by substituting, in lieu of "relevant" in the pre-1970 rule equivalent Sec. 26(d)(4), the test of fairness. See McCormick on Evidence, § 56, and Udall on Evidence, § 11, pp. 21–23.

Sec. 32(d)(3)(B) as to waiver of certain objections not made at the taking of the deposition has been held not to bar an objection to

clearly inadmissible opinion evidence where the offeror offers the testimony not against the deponent party, but against a third party, and where the deponent is readily available to testify; Finn v. J.H. Rose Truck Lines, 1 Ariz.App. 27, 33, 398 P.2d 935 (1965). Nothing in the new rule affects any of the Arizona interpretations mentioned in this Note.

2004 COURT COMMENT [EFFECTIVE DEC. 1, 2004]

The verbatim reading of deposition transcripts at trial can be a tedious exercise for the jury that greatly reduces juror comprehension and attention. Deposition summaries are an effective means of giving a jury the information contained in deposition transcripts in an understandable and abbreviated form. Rule 1006, Rules of Evidence, already encourages the use of summaries of documents that "cannot be conveniently examined in court."

Parties are encouraged to agree upon and use a concise deposition summary instead of a verbatim reading of a deposition transcript. When considered necessary for jury comprehension or an efficient trial, the court may require the use of deposition summaries. See Rule 611, Arizona Rules of Evidence. Similarly, the court may require the editing of videotaped depositions to fairly and succinctly include only the important portions of the proceedings. Additionally, the introduction of important portions of deposition transcripts, which allows direct introduction of key questions and answers, is permitted.

Arizona, like Florida, has an evidentiary rule allowing the court to control the mode and order of interrogating witnesses and presenting evidence:

Rule 611. Mode and Order of Interrogation and Presentation

(a) **Control by Court; Time Limitations**. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment. The court may impose reasonable time limits on the trial proceedings or portions thereof.

(b) **Scope of cross-examination**. A witness may be cross-examined on any relevant matter.

(c) **Leading questions**. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily, leading questions should be permitted on cross-examination. A party may interrogate an unwilling, hostile or biased witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party or a witness whose interests are identified with an adverse party and interrogate that person by leading questions. The witness thus called may be interrogated by leading questions on behalf of the adverse party also.

COMMENT TO EVIDENCE RULE 611(A), 1995 AMENDMENT

Following are suggested procedures for effective document control:
(1) The trial judge should become involved as soon as possible, and no later than the pretrial conference, in controlling the number of documents to be used at trial.
(2) For purposes of trial, only one number should be applied to a document whenever referred to.
(3) Copies of key trial exhibits should be provided to the jurors for temporary viewing or for keeping in juror notebooks.
(4) Exhibits with text should and, on order of the court, shall be highlighted to direct jurors' attention to important language. Where important to an understanding of the document, that language should be explained during the course of trial.
(5) At the close of evidence in a trial involving numerous exhibits, the trial judge shall ensure that a simple and clear retrieval system, e.g., an index, is provided to the jurors to assist them in finding exhibits during deliberations.

After a lengthy discussion and analysis, the Committee concluded that deposition summaries are permitted in Florida and the use of such summaries is within the discretion of the court. *See, e.g.*, 51 AM. JUR. TRIALS §§310, 311, 314; National Judicial College of the ABA, *The Inherent Powers of the Court* (1980); *cf.*, *Urban v. City of Daytona Beach*, 101 So. 2d 414 (Fla. 1st DCA 1958).

Currently, there is no rule in the Florida Rules of Civil Procedure that would prohibit the use of deposition summaries. Since the use of deposition summaries is permitted and there is no case law or rule prohibiting it, the Committee concluded that adding a rule would not aid the effective administration of justice.

The Committee considered whether adding a rule would be of any benefit to the court and to litigants. Currently, if parties agree on a deposition summary, the deposition summary can be read to the court. If the parties disagree on the use of a deposition summary, the court would ultimately have to decide what would be included in the deposition summary and what would not, which would, in essence, require an evidentiary ruling. Further concerns were expressed that if deposition summaries were required, it would increase the workload of attorneys prior to trial and increase expense to the litigants. There was further discussion over whether contested deposition summaries would also ultimately increase the workload of the court. The Committee also considered the benefit of deposition summaries, including the concise presentation of short depositions to the fact finder. The Committee concluded that contested deposition summaries would increase the cost of litigation and the work of the court, but that deposition summaries that were agreed to by the parties could streamline the litigation process.

Another reason to not change the rules is that, if we are moving in the direction of permitting jurors to ask questions, increased reliance on depositions where questions cannot be asked would compromise that goal.

In conclusion, the Committee recommends that no rule be added to the Florida Rules of Civil Procedure at this time because deposition summaries are permitted in Florida if agreed to by the parties within the court's discretion and there is no rule prohibiting the use of such summaries.

H. Recommendation 22 (Expanding the Use of Depositions in Civil Cases (100 Mile Requirement)

Civil Procedure Rules Committee Action: The Committee voted 37-5 to recommend no change to the rules.

Background: Recommendation 22 reads as follows:

The civil rule requirement that a witness must be a greater distance

than 100 miles from the place of a trial as a prerequisite for the use of that person's deposition at trial should be repealed.

Committee Analysis and Comments: The Committee considered Rule 32(a), Arizona Rules of Civil Procedure, "Use of Depositions":

> At the trial or at any hearing any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, and had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. The party who seeks admission of said testimony by deposition may do so without proof of the deponent's unavailability to testify at trial. Nothing contained in this Rule shall be construed to limit, in any way, the right of any party to call the deposed witness to testify in person at trial.
>
> If only part of a deposition is offered in evidence by a party, the court may require the offeror to introduce contemporaneously any other part which ought in fairness to be considered together with the part introduced.
>
> Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action has been brought in any court of the United States or of any state, and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefore. A deposition previously taken may also be used as permitted by the Arizona Rules of Evidence.

The Committee also noted *Maresh v. State*, 489 N.W. 2d 298 (Neb. 1992), which identifies a conflict between the Nebraska Rules of Civil Procedure and the Rules of Evidence.

Essentially, in order to delete the 100 Mile Requirement there would have to be a substantial rewrite to Fla. R. Civ. P. 1.330(a)(3). Currently, rule 1.330(a)(3)

states:

> (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used; or (F) the witness is an expert or skilled witness.

This issue generated lengthy discussion. It was the consensus of the committee that we cannot just delete subdivision (a)(3)(B) because the effect of deleting that provision essentially results in any party being able to use any deposition of any witness at trial. If subdivision (B) were deleted from the rule, there would be no need for subdivisions (C), (D), (E) or (F), which would result in a significant re-write of that rule, which would essentially be a new rule. Further, it was the understanding of the Committee that the purpose of this recommended rule change was to decrease the cost of litigation and make the process more convenient for the witnesses. However, most members of the Committee felt that this change would actually increase the cost of litigation and create additional inconvenience to the witnesses because many lawyers would take lengthier depositions if every deposition could be used at trial and/or depositions would be taken twice, once for the purpose of discovery and then again for use at trial.

Another reason to not change the rules is that, if we are moving in the direction of permitting jurors to ask questions, increased reliance on depositions where questions cannot be asked would compromise that goal.

The Committee also noted that under rule 1.330(a)(3)(E), the court has discretion "in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used." Accordingly, since the court has discretion to permit the deposition

notwithstanding the 100 Mile Requirement, the Committee recommends that no new rule be proposed at this time.

I. Recommendation 23 (Juror Notebooks)

Civil Procedure Rules Committee Action: The Committee voted 34-0 to amend rule 1.200(b) (to add a new (5), authorizing the court to require parties to appear for a conference to consider and determine the use and content of juror notebooks):

> (b) **Pretrial Conference.** After the action is at issue the court itself may or shall on the timely motion of any party require the parties to appear for a conference to consider and determine:
>
> (1) the simplification of the issues;
>
> (2) the necessity or desirability of amendments to the pleadings;
>
> (3) the possibility of obtaining admissions of fact and of documents that will avoid unnecessary proof;
>
> (4) the limitation of the number of expert witnesses; ~~and~~
>
> (5) the potential use of juror notebooks; and
>
> (6) any matters permitted under subdivision (a) of this rule.

and to add a new rule, 1.455 (giving judges discretion to allow documents and exhibits to be included in notebooks for use by the jurors during trial):

> RULE 1.455. JUROR NOTEBOOKS
>
> In its discretion, the court may authorize documents and exhibits to be included in notebooks for use by the jurors during trial to aid them in performing their duties.

Background: Recommendation 23 reads as follows:

> Juror notebooks, which can serve a useful function (especially in civil cases) in lengthy and complex trials, should be specifically authorized by court rule.

Committee Analysis and Comments: In addition to the Jury Innovations Committee report, the Committee considered the changes that Arizona made to Rule 47 and Rule 16(b), Arizona Rules of Civil Procedure:

> (g). Juror Notebooks.
> In its discretion, the court may authorize documents and exhibits to be included in notebooks for use by the jurors during trial to aid them in performing their duties.

Rule 47(g), Arizona Rules of Civil Procedure.

Arizona's Rule 16 addresses subjects to be discussed at the pretrial conference and states:

> **Rule 16(b). Scheduling and Subjects to Be Discussed at Comprehensive Pretrial Conference in Non-Medical Malpractice Cases.**
>
> Except in medical malpractice cases, upon written request of any party the court shall, or upon its own motion the court may, schedule a comprehensive pretrial conference. At any comprehensive pretrial conference under this rule, except for conferences conducted in medical malpractice cases, the court may:
>
> (1) Determine the additional discovery to be undertaken and a schedule therefore. The schedule shall include depositions to be taken and the time for taking same; production of documents; non-uniform interrogatories; admissions; inspections or physical or mental examinations; and any other discovery pursuant to these rules.
>
> (2) Determine a schedule for the disclosure of expert witnesses. Such disclosure shall be within 90 days after the conference except

upon good cause shown.

(3) Determine the number of expert witnesses or designate expert witnesses as set forth in Rule 26(b)(4).

(4) Determine a date for the disclosure of non-expert witnesses and the order of their disclosure; provided, however, that the date for disclosure of all witnesses, expert and non-expert, shall be at least 45 days before the completion of discovery. Any witnesses not so disclosed shall not be allowed to testify at trial unless there is a showing of good cause.

(5) Resolve any discovery disputes which have been presented to the court by way of motion not less than 10 days before the conference. The moving party shall set forth the requested discovery to which objection is made and the basis for the objection. The responding party may file a response not less than 3 days before the conference. No replies shall be filed unless ordered by the court. The court shall assess an appropriate sanction, including those permitted under Rule 16(f), against any party or attorney who has engaged in unreasonable, groundless, abusive or obstructionist discovery.

(6) Eliminate non-meritorious claims or defenses.

(7) Permit the amendment of the pleadings.

(8) Assist in identifying those issues of fact which are still at issue.

(9) Obtain stipulations as to the foundation or admissibility of evidence.

(10) Determine the desirability of special procedures for management of the case.

(11) Consider alternative dispute resolution.

(12) Determine whether any time limits or procedures set forth in the discovery rules or set forth in these Rules or Local Rules of

Practice should be modified or suspended.

(13) Determine whether Rule 26.1 has been appropriately complied with by the parties.

(14) Determine a date for a settlement conference if such a conference is requested by a party or deemed advisable by the court.

(15) Determine a date for filing the joint pretrial statement required by subpart (d) of these Rules.

(16) Determine a trial date.

(17) Discuss the imposition of time limits on trial proceedings or portions thereof, the use of juror notebooks, the giving of brief pre-voir dire opening statements and preliminary jury instructions, and the effective management of documents and exhibits.

(18) Make such other orders as the court deems appropriate.

J. Recommendation 26 (Written Jury Instructions)

and

K. Recommendation 31 (Final Instructions Before Closing Arguments)

Civil Procedure Rules Committee Action: The Committee voted 34-1 to propose amendments to rule 1.470 ("Exceptions Unnecessary") as follows:

(b) **Instructions to Jury.** Not later than at the close of the evidence, the parties shall file written requests that the court instruct~~charge~~ the jury on the law set forth in such requests. The court shall then require counsel to appear before it to settle the instructions~~charges~~ to be given. At such conference, all objections shall be made and ruled upon and the court shall inform counsel of such instructions~~charges~~ as it will give. No party may assign as error the giving of any instruction~~charge~~ unless that party objects thereto at such time, or the failure to give any instruction~~charge~~ unless that party requested the same. ~~The court shall orally charge the jury after the~~

~~arguments are completed and, when practicable, shall furnish a copy of its charges to the jury.~~ Before closing arguments, the court shall orally instruct the jury on the issues to be decided and provide any other instructions relevant to closing arguments. Upon completion of closing arguments, the court shall give any remaining instructions and may repeat any instruction before the jury retires to deliberate. The court shall provide each juror with a written set of the instructions for his or her use in deliberations. The court shall file a copy of such instructions.

Background: Recommendation 26 deals with written jury instructions and 31 with final instructions before closing arguments. Recommendation 31 was submitted to the Committee for implementation, and 26 was submitted for review. The text of these two Recommendations is as follows:

> 26 (Written Jury Instructions):
> Copies of the written jury instructions should be given to jurors for their use during deliberations.
>
> 31 (Final Instructions Before Closing Arguments):
> Judges should be encouraged to deliver their final instructions to the jury *before* closing arguments.

In his directive to the Committee on all of the Recommendations, Justice Anstead wrote with regard to Recommendations 26 and 31:

> The Court would like your committee to review recommendation 26 (Written Jury Instructions) and submit a proposed rule if the committee determines a rule is warranted. If the committee determines no rule is in order, please explain the committee's reasoning in your report. The Court also would like your committee to consider recommendation 31 (Final Instructions Before Closing Arguments), which the Court approves in concept, and propose any amendments the committee believes are warranted.

Committee Analysis and Comments: The Committee discussed Recommendations 26 and 31 extensively. In short, it was decided unanimously that both Recommendations have merit and should be implemented. It was further decided that such implementation could be accomplished through amendments to

Fla. R. Civ. P. 1.470(b). During its discussion, the Committee reviewed the response of the Supreme Court Committee on Standard Jury Instructions in Civil Cases with regard to these Recommendations as well as the following jury instruction language from Arizona, Arkansas, the District of Columbia, and Idaho, and Mississippi:

Arizona Rule 51(b)(3):

> The court's preliminary and final instructions on the law shall be in written form and a copy of the instructions shall be furnished to each juror before being read by the court. Upon retiring for deliberations the jurors shall take with them all jurors' copies of final written instructions given by the court. In limited jurisdiction courts, the court may record jury instructions on audiotape and provide these audio instructions to the jury for their use during deliberations.

Arkansas Rule 51: The court shall instruct the jury prior to the arguments of counsel.

District of Columbia: In 1998, the DC Jury Project recommended that "judges give final jury instructions on substantive law before closing arguments, reserving only instructions on administrative matters until after closing arguments." DC Jury Project Recommendation 26.

Idaho Rule 51(b):

> **Rulings on Objections — Final Instructions and Arguments**. The court may give instructions to the jury at any time, and at various times, during the trial, all of which shall be made written instructions and constitute part of the record. Prior to giving any opening or final instructions, the court shall furnish copies of them to all parties and allow counsel a reasonable time to examine them and make objections outside the presence of the jury. No party may assign as error the giving of or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the instruction to which that party objects and the grounds of the objection. After the court makes all rulings on requested instructions and objections, and advises the parties of the final instructions to be given, the court shall read to the jury the written instructions before

the final arguments of the parties are given. All final arguments shall be reported verbatim unless otherwise stipulated in the record by all of the parties to the action. The written instructions, and a minimum of two copies thereof, shall be given to the jury to take when the jury retires for deliberation. Any request by the jury to be further informed of any point concerning the action shall be communicated to the court in writing, at which time the attorneys for the parties shall be given the opportunity to be present, if the attorney is available and can be present within a reasonable period of time, and the court in its discretion may further instruct the jury in writing or explain the instructions in open court which shall be made part of the record.

Mississippi Rule 51:

(c) **Instructions to be Written**. Except as allowed by Rule 51(a), all instructions shall be in writing.

(d) **When Read; Available to Counsel and Jurors**. Instructions shall be read by the court to the jury at the close of all the evidence and prior to oral argument; they shall be available to counsel for use during argument. Instructions shall be carried by the jury into the jury room when it retires to consider its verdict.

The major concern raised during the discussion of Recommendations 26 and 31 was incorporating them without encroaching on the trial court's inherent power to exercise reasonable control of its courtroom. In other words, would the jury instruction requirements be mandatory or discretionary? While Recommendation 26 seems to require the trial court to provide the jury with written instructions, the question of when to do so presents problems, especially in conjunction with Recommendation 31. Rule 1.470(b) already seems to make written jury instructions mandatory, but gives the court an out with the language "when practicable." The Standard Civil Jury Instructions Committee recommends that if oral instructions are given before closing arguments, written instructions should also be given at that time. Members of the Committee initially agreed with that pronouncement, but acknowledged that it is not always practicable to give written jury instructions before closing arguments (there is not always enough time to get them together before closing arguments as they may change at the last instance).

Another issue that was addressed by the Committee was what to call the

different types of jury instructions: "Substantive instructions" or "instructions on the law" vs. "non-substantive" or "procedural" or "administrative" or "housekeeping" instructions? The Standard Civil Jury Instructions Committee used the terms "substantive" vs. "procedural." The Jury Innovations Committee itself called the instructions "substantive" vs. "instructions on administrative matters." Section 40.50(5), Fla. Stat., provides that

> The court may give final instructions to the jury before closing arguments of counsel to enhance jurors' ability to apply the law to the facts. In that event, the court may withhold giving the necessary *procedural and housekeeping* instructions until after closing arguments.

Following discussion of these issues, the Committee concluded that it should be mandatory for the court to give the jury written instructions. However, when they should be given would be discretionary. This could be accomplished by excluding any "time" language as it relates to the written instructions. It was also concluded that it should be mandatory for the court to orally instruct before closing arguments. The Committee determined after much debate that the terminology used to describe the types of instructions given before closing arguments should be instructions "on the issues to be decided or any other instructions relevant to closing arguments." This language was determined to give the trial courts the most latitude in deciding what is a substantive instruction and what is an administrative instruction on a case-by-case basis. It was suggested that there could be problems in cases with several defendants, including *Fabre* defendants, involving various causes of actions and issues such as agency, where some of the administrative details as to the verdict form could detract from the jury hearing the substantive instructions prior to closing. Hence, it was determined by the Committee that the trial court should be permitted to repeat any of the "substantive" instructions it feels necessary *after* closing arguments as well.

In drafting the amendments to rule 1.470(b), the Committee faced certain language questions. First, the Committee needed to determine whether to use the phrase "closing arguments" or "final arguments." In order to make this determination, the rules for civil procedure, criminal procedure, and judicial administration were searched. It was found that there is no mention of either of these phrases in any of those rules. The civil procedure rules simply call them "arguments." Case law referring to rule 1.470 was also searched and it was found that the majority of those cases call them "closing arguments." Accordingly, in

keeping with the bulk of the case law, the phrase "closing arguments" was chosen for use in the rule.

Another language issue was the use of the words "charge" or "instruct/instructions" throughout the rule. It was determined by the Committee that it is more appropriate to use the words "instruct" or "instructions" consistently throughout the rule in keeping with the name of subdivision 1.470(b) — "Instructions to Jury."

Other issues tackled by the Committee in drafting the amendments to the rule included the fact that the statute (now repealed) that the rule was based on required that any written instructions should be filed in the case and form a part of the record in the case. Language shadowing this repealed statute has been added at the end of the proposed rule. Further, in *All Bank Repos, Inc. v. Underwriters of Lloyds of London*, 582 So. 2d 692, 695 (Fla. 4th DCA 1991), the Fourth District held that the rule implicitly required that if an instruction is written and provided to the jury, all of the instructions must be provided in writing to the jury. This requirement has been made clear by the use of the phrase "written set of the instructions."

L. Recommendation 33 (Read-back of Testimony)

Civil Procedure Rules Committee Action: The Committee voted 34-0 to recommend no rule change.

Background: Recommendation 33 is as follows:

> The Supreme Court should develop specific criteria for denying a read-back request. Such criteria could include relevant factors, such as whether the requested testimony is too lengthy or too vague. While the trial judge should have discretion in granting or denying the read-back of testimony, such a read-back should not be denied unless the court finds that one of the criteria, such as excessive length or vagueness, is met.

Committee Analysis and Comments: Research was conducted and case law was found on the issue of read-back of testimony which gives trial judges broad discretion in deciding whether to read back testimony.

> . . . . It is well established that trial judges have broad discretion in deciding whether to read back testimony. *See State v. Riechmann,* 777 So.2d 342 (Fla.2000); *Henry v. State,* 649 So.2d 1361, 1365 (Fla.1994); *Coleman v. State,* 610 So.2d 1283, 1286 (Fla.1992). In *Riechmann,* we noted, in deciding that no error had occurred, that the judge met with both parties prior to responding to the jury's request, and that the testimony which was not read back was that of a State witness which would have prejudiced the defense. *See id.* at 365. Similarly, in this case, the judge had extensive discussions with both parties prior to responding to the jury. During those discussions, defense counsel agreed with the trial court that the jury should be told that the read back of C.J.'s testimony would take three hours. This strategy would have favored the defense since the testimony that was requested was that of the State's key witness.
>
> Additionally, courts have found no abuse of discretion even where the trial judge has, without much consideration, entirely rejected the jury's request for a read back. *See, e.g., McKee v. State,* 712 So.2d 837, 838 (Fla. 2d DCA 1998) (holding that trial judge who failed to read back testimony of victim upon jury's request, but instead told jurors to rely on their own memory, did not abuse his broad discretion). Courts have consistently found no abuse of discretion in denial of a jury's request for a read back when doing so would not be practical. *See, e.g., Miller v. State,* 605 So.2d 492, 495 (Fla. 3d DCA 1992) (finding no abuse of discretion where court reporter did not have her notes with her); *DeCastro v. State,* 360 So.2d 474 (Fla. 3d DCA 1978) (finding no abuse of discretion where it was not practical because testimony was extensive and court reporter was physically exhausted).

Francis v. State, 808 So. 2d 110, 130 (Fla. 2001) (finding no abuse of discretion where trial court told jury that reading back of testimony would take three hours and then left it up for the jury to decide).

The Committee does not believe Recommendation 33 requires that any of the Rules of Civil Procedure be amended or that any new rules be drafted.

M. Recommendation 35 (Less than Unanimous Verdicts)

Civil Procedure Rules Committee Action: The Committee voted 34-0 to recommend no changes.

Background: The text of Recommendation 35 is as follows:

> In criminal cases, no consideration should be given to less than unanimous verdicts, unless upon stipulation of the defendant, irrespective of whether initiated by the judge, an attorney, or the defendant. However, there should be some consideration to generally allowing the attorneys and parties to stipulate to less-than-unanimous verdicts in civil cases under appropriate circumstances.

Committee Analysis and Comments: The Committee felt overwhelmingly that a civil rule change is simply not necessary in response to Recommendation 35. If parties want a less-than-unanimous verdict, they can stipulate to one without the necessity of a civil rule.

Because of time constraints, these proposed amendments have not been published in the Bar *News* or on the Bar's website. They will be posted simultaneously with the filing of this petition, and the period for comment will be 30 days, unless the Court requests otherwise. The rules will also be submitted to the Rules of Judicial Administration Committee and the Florida Bar Board of Governors.

Respectfully submitted _____, 2005.

_____

ROBERT N. CLARKE, JR.
Chair, Civil Procedure Rules Committee
Ausley & McMullen, P.A.
P.O. Box 391
Tallahassee, Florida 32302-0391
(850) 224-9115
FLORIDA BAR # 592900

_____

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
651 E. Jefferson St.
Tallahassee, FL 32399-2300
(850) 561-5600
FLORIDA BAR #123390

LIST OF APPENDIXES

TABLE OF CONTENTS

1.320.	DEPOSITIONS UPON WRITTEN QUESTIONS	[no change]
1.330.	USE OF DEPOSITIONS IN COURT PROCEEDINGS	[no change]
1.340.	INTERROGATORIES TO PARTIES	[no change]
1.350.	PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES	[no change] [no change]
1.351.	PRODUCTION OF DOCUMENTS AND THINGS WITHOUT DEPOSITION	[no change]
1.360.	EXAMINATION OF PERSONS	[no change]
1.370.	REQUESTS FOR ADMISSION	[no change]
1.380.	FAILURE TO MAKE DISCOVERY; SANCTIONS	[no change]
1.390.	DEPOSITIONS OF EXPERT WITNESSES	[no change]
1.410.	SUBPOENA	
1.420.	DISMISSAL OF ACTIONS	[no change]
1.430.	DEMAND FOR JURY TRIAL; WAIVER	[no change]
1.431.	TRIAL JURY	
1.440.	SETTING ACTION FOR TRIAL	[no change]
1.442.	PROPOSALS FOR SETTLEMENT	[no change]
1.450.	EVIDENCE	[no change]
1.452.	QUESTIONS BY JURORS Committee vote: 45-5	**[new rule]**
1.455.	JUROR NOTEBOOKS Committee vote: 34-1	**[new rule]**
1.460.	CONTINUANCES	[no change]
1.470.	EXCEPTIONS UNNECESSARY Committee vote: 34-1	**[amended]**
1.480.	MOTION FOR A DIRECTED VERDICT	[no change]
1.481.	VERDICTS	[no change]
1.490.	MASTERS	[no change]
1.500.	DEFAULTS AND FINAL JUDGMENTS THEREON	[no change]
1.510.	SUMMARY JUDGMENT	[no change]
1.520.	VIEW	[no change]
1.525.	MOTIONS FOR COSTS AND ATTORNEYS' FEES	[no change]
1.530.	MOTIONS FOR NEW TRIAL AND REHEARING; AMENDMENTS OF JUDGMENT	[no change]
1.540.	RELIEF FROM JUDGMENT, DECREES, OR ORDERS	[no change]
1.550.	EXECUTIONS AND FINAL PROCESS	[no change]
1.560.	DISCOVERY IN AID OF EXECUTION	[no change]

1.570.	ENFORCEMENT OF FINAL JUDGMENTS	[no change]
1.580.	WRIT OF POSSESSION	[no change]
1.590.	PROCESS IN BEHALF OF AND AGAINST PERSONS NOT PARTIES	[no change]
1.600.	DEPOSITS IN COURT	[no change]
1.610.	INJUNCTIONS	[no change]
1.620.	RECEIVERS	[no change]
1.625.	PROCEEDINGS AGAINST SURETY ON JUDICIAL BONDS	[no change]
1.630.	EXTRAORDINARY REMEDIES	[no change]
1.650.	MEDICAL MALPRACTICE PRESUIT SCREENING RULE	[no change]
1.700.	RULES COMMON TO MEDIATION AND ARBITRATION	[no change]
1.710.	MEDIATION RULES	[no change]
1.720.	MEDIATION PROCEDURES	[no change]
1.730.	COMPLETION OF MEDIATION	[no change]
1.750.	COUNTY COURT ACTIONS	[no change]
1.800.	EXCLUSIONS FROM ARBITRATION	[no change]
1.810.	SELECTION AND COMPENSATION OF ARBITRATORS	[no change]
1.820.	HEARING PROCEDURES FOR NON-BINDING ARBITRATION	[no change]
1.830.	VOLUNTARY BINDING ARBITRATION	[no change]
1.900.	FORMS	[no change]
1.901.	CAPTION	[no change]
1.902.	SUMMONS	[no change]
1.903.	CROSSCLAIM SUMMONS	[no change]
1.904.	THIRD-PARTY SUMMONS	[no change]
1.905.	ATTACHMENT	[no change]
1.906.	ATTACHMENT — FORECLOSURE	[no change]
1.907.	GARNISHMENT	[no change]
1.908.	WRIT OF REPLEVIN	[no change]
1.909.	DISTRESS	[no change]
1.910.	SUBPOENA FOR TRIAL	[no change]
1.911.	SUBPOENA DUCES TECUM FOR TRIAL	[no change]
1.912.	SUBPOENA FOR DEPOSITION	[no change]
1.913.	SUBPOENA DUCES TECUM FOR DEPOSITION	[no change]
1.914.	EXECUTION	[no change]

1.915.	WRIT OF POSSESSION	[no change]
1.916.	REPLEVIN ORDER TO SHOW CAUSE	[no change]
1.917.	NE EXEAT	[no change]
1.918.	LIS PENDENS	[no change]
1.919.	NOTICE OF ACTION; CONSTRUCTIVE SERVICE — NO PROPERTY	[no change]
1.920.	NOTICE OF ACTION; CONSTRUCTIVE SERVICE — PROPERTY	[no change]
1.921.	NOTICE OF PRODUCTION FROM NONPARTY	[no change]
1.922.	SUBPOENA DUCES TECUM WITHOUT DEPOSITION	[no change]
1.923.	EVICTION SUMMONS/RESIDENTIAL	[no change]
1.932.	OPEN ACCOUNT	[no change]
1.933.	ACCOUNT STATED	[no change]
1.934.	PROMISSORY NOTE	[no change]
1.935.	GOODS SOLD	[no change]
1.936.	MONEY LENT	[no change]
1.937.	REPLEVIN	[no change]
1.938.	FORCIBLE ENTRY AND DETENTION	[no change]
1.939.	CONVERSION	[no change]
1.940.	EJECTMENT	[no change]
1.941.	SPECIFIC PERFORMANCE	[no change]
1.942.	CHECK	[no change]
1.944.	MORTGAGE FORECLOSURE	[no change]
1.945.	MOTOR VEHICLE NEGLIGENCE	[no change]
1.946.	MOTOR VEHICLE NEGLIGENCE WHEN PLAINTIFF IS UNABLE TO DETERMINE WHO IS RESPONSIBLE	[no change]
1.947.	TENANT EVICTION	[no change]
1.948.	THIRD-PARTY COMPLAINT. GENERAL FORM	[no change]
1.949.	IMPLIED WARRANTY	[no change]
1.951.	FALL-DOWN NEGLIGENCE COMPLAINT	[no change]
1.960.	BOND. GENERAL FORM	[no change]
1.961.	VARIOUS BOND CONDITIONS	[no change]
1.965.	DEFENSE. STATUTE OF LIMITATIONS	[no change]
1.966.	DEFENSE. PAYMENT	[no change]
1.967.	DEFENSE. ACCORD AND SATISFACTION	[no change]
1.968.	DEFENSE. FAILURE OF CONSIDERATION	[no change]
1.969.	DEFENSE. STATUTE OF FRAUDS	[no change]

1.970.	DEFENSE. RELEASE	[no change]
1.971.	DEFENSE. MOTOR VEHICLE CONTRIBUTORY NEGLIGENCE	[no change]
1.972.	DEFENSE. ASSUMPTION OF RISK	[no change]
1.976.	STANDARD INTERROGATORIES	[no change]
1.977.	FACT INFORMATION SHEET	[no change]
1.980.	DEFAULT	[no change]
1.981.	SATISFACTION OF JUDGMENT	[no change]
1.982.	CONTEMPT NOTICE	[no change]
1.983.	PROSPECTIVE JUROR QUESTIONNAIRE	[no change]
1.984.	JUROR VOIR DIRE QUESTIONNAIRE Committee vote: 35-0	**[amended**]
1.985.	STANDARD JURY INSTRUCTIONS	[no change]
1.986.	VERDICTS	[no change]
1.988.	JUDGMENT AFTER DEFAULT	[no change]
1.989.	JUDGMENT DISMISSING FOR LACK OF PROSECUTION	[no change]
1.990.	FINAL JUDGMENT FOR PLAINTIFF. JURY ACTION FOR DAMAGES	[no change]
1.991.	FINAL JUDGMENT FOR DEFENDANT. JURY ACTION FOR DAMAGES	[no change]
1.993.	FINAL JUDGMENT FOR PLAINTIFF. GENERAL FORM. NON-JURY	[no change]
1.994.	FINAL JUDGMENT FOR DEFENDANT. GENERAL FORM. NON-JURY	[no change]
1.995.	FINAL JUDGMENT OF REPLEVIN	[no change]
1.996.	FINAL JUDGMENT OF FORECLOSURE	[no change]
1.997.	CIVIL COVER SHEET	[no change]
1.998.	FINAL DISPOSITION FORM	[no change]

APPENDIX — INTERROGATORIES [no change]

RULE 1.200. PRETRIAL PROCEDURE

(a) **Case Management Conference.** At any time after responsive pleadings or motions are due, the court may order, or a party, by serving a notice, may convene, a case management conference. The matter to be considered shall be specified in the order or notice setting the conference. At such a conference the court may:

(1) schedule or reschedule the service of motions, pleadings, and other papers;

(2) set or reset the time of trials, subject to rule 1.440(c);

(3) coordinate the progress of the action if complex litigation factors are present;

(4) limit, schedule, order, or expedite discovery;

(5) schedule disclosure of expert witnesses and the discovery of facts known and opinions held by such experts;

(6) schedule or hear motions in limine;

(7) pursue the possibilities of settlement;

(8) require filing of preliminary stipulations if issues can be narrowed;

(9) consider referring issues to a magistrate for findings of fact; and

(10) schedule other conferences or determine other matters that may aid in the disposition of the action.

(b) **Pretrial Conference.** After the action is at issue the court itself may or shall on the timely motion of any party require the parties to appear for a conference to consider and determine:

(1) the simplification of the issues;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents that will avoid unnecessary proof;

(4) the limitation of the number of expert witnesses; ~~and~~

(5) the potential use of juror notebooks; and

(6) any matters permitted under subdivision (a) of this rule.

(c) **Notice.** Reasonable notice shall be given for a case management conference, and 20 days' notice shall be given for a pretrial conference. On failure of a party to attend a conference, the court may dismiss the action, strike the pleadings, limit proof or witnesses, or take any other appropriate action. Any documents that the court requires for any conference shall be specified in the order. Orders setting pretrial conferences shall be uniform throughout the territorial jurisdiction of the court.

(d) **Pretrial Order.** The court shall make an order reciting the action taken at a conference and any stipulations made. The order shall control the subsequent course of the action unless modified to prevent injustice.

Committee Notes

1971 Amendment. The 3 paragraphs of the rule are lettered and given subtitles. The present last paragraph is placed second as subdivision (b) because the proceeding required under it is taken before that in the present second paragraph. The time for implementation is changed from settling the issues because the language is erroneous, the purpose of the conference being to settle some and prepare for the trial of other issues. The last 2 sentences of subdivision (b) are added to require uniformity by all judges of the court and to require specification of the documentary requirements for the conference. The last sentence of subdivision (c) is deleted since it is covered by the local rule provisions of rule 1.020(d). The reference to the parties in substitution for attorneys and counsel is one of style because the rules generally impose obligations on the parties except when the attorneys are specifically intended. It should be understood that those parties represented by attorneys will have the attorneys perform for them in the usual manner.

1972 Amendment. Subdivision (a) is amended to require the motion for a pretrial by a party to be timely. This is done to avoid motions for pretrial conferences made a short time before trial and requests for a continuance of the trial as a result of the pretrial conference order. The subdivision is also amended to require the clerk to send to the judge a copy of the motion by a party for the pretrial conference.

1988 Amendment. The purpose of adding subdivision (a)(5) is to spell out clearly for the bench and bar that case management conferences may be used for scheduling the disclosure of expert witnesses and the discovery of the opinion and factual information held by those experts. Subdivision (5) is not intended to expand discovery.

1992 Amendment. Subdivision (a) is amended to allow a party to set a case management conference in the same manner as a party may set a hearing on a motion. Subdivision (c) is amended to remove the mandatory language and make the notice requirement for a case management conference the same as that for a hearing on a motion; *i.e.*, reasonable notice.

Court Commentary

1984 Amendment. This is a substantial rewording of rule 1.200. Subdivision (a) is added to authorize case management conferences in an effort to give the court more control over the progress of the action. All of the matters that the court can do under the case management conference can be done at the present time under other rules or because of the court's authority otherwise. The new subdivision merely emphasizes the court's authority and arranges an orderly method for the exercise of that authority. Subdivisions (a), (b), and (c) of the existing rule are relettered accordingly. Subdivision (a) of the existing rule is also amended to delete the reference to requiring the attorneys to appear at a pretrial conference by referring to the parties for that purpose. This is consistent with the language used throughout the rules and does not contemplate a change in present procedure. Subdivisions (a)(5) and (a)(6) of the existing rule are deleted since they are now covered adequately under the new subdivision (a). Subdivisions (b) and (c) of the existing rule are amended to accommodate the 2 types of conferences that are now authorized by the rules.

RULE 1.452. QUESTIONS BY JURORS

(a) The court may permit jurors to submit to the court written questions directed to witnesses or to the court. When permitted, such questions will be submitted after all counsel have concluded their questioning of a witness.

(b) Any juror who has a question directed to the witness or the court shall prepare an unsigned, written question and give the question to the bailiff, who will give the question to the judge.

(c) Out of the presence of the jury, the judge will read the question to all counsel, allow counsel to see the written question, and give counsel an opportunity to object to the question.

(d) If the court determines that the juror's question calls for admissible evidence,

(1) the answer may be stipulated by the parties in writing and read by the court to the jury, or

(2) the court may pose the question to the witness and then may permit related questioning by counsel. The court may place conditions or limitations on such additional questioning or testimony.

(e) If the court determines that the juror's question calls for inadmissible evidence, the question shall not be read or answered. The court shall tell the jury that trial rules do not permit some questions and that the jurors should not attach any significance to the fact that the question was not answered.

RULE 1.455. JUROR NOTEBOOKS

In its discretion, the court may authorize documents and exhibits to be included in notebooks for use by the jurors during trial to aid them in performing their duties.

Committee Notes

2007 Amendment. In trials of unusual duration or involving complex issues, juror notebooks may aid juror comprehension and recall of evidence, and their use should be encouraged.

RULE 1.470. EXCEPTIONS UNNECESSARY

(a) **Adverse Ruling.** For appellate purposes no exception shall be necessary to any adverse ruling, order, instruction, or thing whatsoever said or done at the trial or prior thereto or after verdict, which was said or done after objection made and considered by the trial court and which affected the substantial rights of the party complaining and which is assigned as error.

(b) **Instructions to Jury.** Not later than at the close of the evidence, the parties shall file written requests that the court instruct~~charge~~ the jury on the law set forth in such requests. The court shall then require counsel to appear before it to settle the instructions~~charges~~ to be given. At such conference, all objections shall be made and ruled upon and the court shall inform counsel of such instructions~~charges~~ as it will give. No party may assign as error the giving of any instruction~~charge~~ unless that party objects thereto at such time, or the failure to give any instruction~~charge~~ unless that party requested the same. ~~The court shall orally charge the jury after the arguments are completed and, when practicable, shall furnish a copy of its charges to the jury.~~ Before closing arguments, the court shall orally instruct the jury on the issues to be decided and provide any other instructions relevant to closing arguments. Upon completion of closing arguments, the court shall give any remaining instructions and may repeat any instruction before the jury retires to deliberate. The court shall provide each juror with a written set of the instructions for his or her use in deliberations. The court shall file a copy of such instructions.

(c) **Orders on New Trial, Directed Verdicts, etc.** It shall not be necessary to object or except to any order granting or denying motions for new trials, directed verdicts, or judgments non obstante veredicto or in arrest of judgment to entitle the party against whom such ruling is made to have the same reviewed by an appellate court.

Committee Notes

1988 Amendment. The word "general" in the third sentence of subdivision (b) was deleted to require the court to specifically inform counsel of the changes it intends to give. The last sentence of that subdivision was amended to encourage judges to furnish written copies of their charges to juries.

FORM 1.984. JUROR VOIR DIRE QUESTIONNAIRE

JURY QUESTIONNAIRE

Instructions to Jurors

You have been selected as a prospective juror. It will aid the court and help shorten the trial of cases if you will answer the questions on this form and return it in the enclosed self-addressed stamped envelope within the next 2 days. Please complete the form in blue or black ink and write as dark and legibly as you can.

1. Name (print) .....
(first) (middle) (last)

2. Residence address .....

3. Years of residence: In Florida .....
In this county .....

4. Former residence .....

5. Marital status: (married, single, divorced, widow, or widower) .....

6. Your occupation and employer .....

7. If you are not now employed, give your last occupation and employer .....

8. If married, name and occupation of husband or wife .....

9. Have you served as a juror before? .....

10. Have you or any member of your immediate family been a party to any lawsuit? ..... If so, when and in what court? .....

11. Are you either a close friend of or related to any law enforcement officer? .....

12. Has a claim for personal injuries ever been made against you or any member of your family? .....

~~13. Have you or any member of your family ever made any claim for personal injuries? .....~~

1. Please print your full name: .....

2. State your residence address or, if you prefer, specify what neighborhood, subdivision, or part of the county you live in: .....
.....

3. How long have you lived in this county? .....

4. Do you own your residence? .....

5. Briefly describe your formal education: .....

6. Are you employed? ..... If so, what do you do? .....
Who is your employer? .....

7. List all other types of employment you have had in your adult life: .....
.....

8. If now unemployed, what was your most recent employment? .....

9. What is your marital status? Single ..... Married ..... Separated .....
Divorced ..... Widowed .....

10. Do others live with you in your residence? ..... If so, what are their relationships to you? .....

11. Are any of the people who live with you employed? ..... If so, who is/are his, her, or their employer(s)? .....
.....

12. Do you have any children who do not live with you? ..... If so, what are their ages?
.....

13. If any of your children who do not live with you are employed, what do they do? .....
.....

14. Have you or any member of your family ever worked for a law firm or in the court system? .....

15. Have you or anyone close to you ever sued someone in ANY kind of case? (This includes divorce, domestic violence, child support, landlord-tenant, small claims or workers' compensation, as well as business and injury disputes and any other litigation.)
.....

16. Have you or anyone close to you ever been sued by someone in ANY kind of case? ..... If so, please explain. .....
.....

17. Have you or anyone close to you ever consulted a lawyer because you or someone close to you suffered any kind of personal injury or harm? .....

18. Have you ever been a witness in a lawsuit? .....

19. Have you ever served on a jury? ..... If so, how many times? ..... How many were civil? ..... How many were criminal? ..... How many times did the jury reach a verdict? ..... How many times were you the foreperson? .....

20. Have you or anyone close to you been a crime victim? .....

21. Have you or anyone close to you been charged with committing a crime? .....

22. Do you or anyone close to you have any legal training? ..... If so, please describe:
.....

23. Do you or anyone close to you have any medical training? ..... If so, please describe: .....

24. Do you or anyone close to you have any training, education, or degrees in any other technical or scientific field or any specialized area of knowledge? ..... If so, please describe: .....

25. Are you a friend or relative of a law enforcement officer? .....

26. Do you have any military experience? If so, please describe: .....
.....

27. Do you have any medical condition or disability that may prevent or hinder you from serving on this jury, or that could make it difficult for you to participate as a juror or to understand the case and the evidence? .....
If so, is there an accommodation that can enable you to serve? .....
.....

28. Are there any time constraints in your schedule or demands in your life that you would like the court to consider when deciding whether you must serve on this jury?
.....
.....

29. Will you be able to get to the courthouse for each day of jury duty? ..... If not,

please explain: .....

30. Did you complete this form yourself or did someone assist you?
(Circle one) Self Assisted
Please describe any assistance you received: .....

_____
Juror's Signature

NOTE: This form does not have a caption as shown in form 1.901, but should be headed with the name of the court summoning the juror.

Proposed changes:

Reasons for change:

RULE 1.200. PRETRIAL PROCEDURE

(a) [no change]

(b) **Pretrial Conference.** After the action is at issue the court itself may or shall on the timely motion of any party require the parties to appear for a conference to consider and determine:

(1) the simplification of the issues;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents that will avoid unnecessary proof;

(4) the limitation of the number of expert witnesses; ~~and~~

(5) the potential use of juror notebooks; and

This change authorizes the court to require parties to appear for a conference to consider and determine the use of juror notebooks, a worthwhile innovation.

(6) any matters permitted under subdivision (a) of this rule.

(c) [no change]

(d) [no change]

Proposed changes:

RULE 1.452. QUESTIONS BY JURORS

(a) The court may permit jurors to submit to the court written questions directed to witnesses or to the court. When permitted, such questions will be submitted after all counsel have concluded their questioning of a witness.

(b) Any juror who has a question directed to the witness or the court shall prepare an unsigned, written question and give the question to the bailiff, who will give the question to the judge.

(c) Out of the presence of the jury, the judge will read the question to all counsel, allow counsel to see the written question, and give counsel an opportunity to object to the question.

(d) If the court determines that the juror's question calls for admissible evidence,

(1) the answer may be stipulated by the parties in writing and read by the court to the jury, or

(2) the court may pose the question to the witness and then may permit related questioning by counsel. The court may place conditions or limitations on such additional questioning or testimony.

(e) If the court determines that the juror's

Reasons for change:

Fla. Stat. 40.50, effective October 1, 1999, provides that the court "shall" permit jurors to submit written questions to witnesses or the court. A rule of procedure should be adopted embodying the procedure for jurors to ask witnesses questions.

question calls for inadmissible evidence, the question shall not be read or answered. The court shall tell the jury that trial rules do not permit some questions and that the jurors should not attach any significance to the fact that the question was not answered.

Proposed changes:

RULE 1.455. JUROR NOTEBOOKS

In its discretion, the court may authorize documents and exhibits to be included in notebooks for use by the jurors during trial to aid them in performing their duties.

Committee Notes

2007 Amendment. In trials of unusual duration or involving complex issues, juror notebooks may aid juror comprehension and recall of evidence, and their use should be encouraged.

Reasons for change:

Juror notebooks can be very helpful in complicated trials, and a rule should be created authorizing their use.

Proposed changes:

Reasons for change:

RULE 1.470. EXCEPTIONS NECESSARY

(a) [no change]

(b) **Instructions to Jury.** Not later than at the close of the evidence, the parties shall file written requests that the court instruct~~charge~~ the jury on the law set forth in such requests. The court shall then require counsel to appear before it to settle the instructions~~charges~~ to be given. At such conference, all objections shall be made and ruled upon and the court shall inform counsel of such instructions~~charges~~ as it will give. No party may assign as error the giving of any instruction~~charge~~ unless that party objects thereto at such time, or the failure to give any instruction~~charge~~ unless that party requested the same. ~~The court shall orally charge the jury after the arguments are completed and, when practicable, shall furnish a copy of its charges to the jury.~~ Before closing arguments, the court shall orally instruct the jury on the issues to be decided and provide any other instructions relevant to closing arguments. Upon completion of closing arguments, the court shall give any remaining instructions and may repeat any instruction before the jury retires to deliberate. The court shall provide each juror with a written set of the instructions for his or her use in deliberations. The

It is was more appropriate to used the words "instruct" or "instructions" consistently throughout the rule in keeping with the name of subdivision 1.470(b) — "Instructions to Jury."

It should be mandatory for the court to orally instruct the jury before closing arguments. The types of instructions given then should be "on the issues to be decided or any other instructions relevant to closing arguments." This language gives trial courts the most latitude in deciding what is a substantive instruction and what is an administrative instruction on a case-by-case basis. Because of potential problems in cases with

court shall file a copy of such instructions.

(c) [no change]

multiple defendants, the trial court should be permitted to repeat any of the "substantive" instructions it feels necessary after closing arguments as well. Although it would be useful if, when oral instructions are given before closing arguments, written instructions were also given at that time, it is not always practicable to do so because the instructions may change at the last minute.

Supreme Court of Florida

500 South Duval Street
Tallahassee, Florida 32399-1925

October 17, 2003

The Honorable Jennifer Drechsel Bailey
Chair, Civil Procedure Rules Committee
Courthouse Center
73 West Flagler Street, Suite 1001
Miami, Florida 33130-4763

Re: Final Report of the Jury Innovations Committee

Dear Judge Bailey:

I am writing to you in your capacity as Chair of the Civil Procedure Rules Committee to ask your committee to consider a number of recommendations made by the Judicial Management Council's Jury Innovations Committee. For your convenience, I enclose a copy of the Jury Innovations Committee's Final Report and a copy of the Court's administrative order, which has attached a chart of the action the Court has taken on the Committee's recommendations. Copies of both can be found on the Court's website at www.flcourts.org/pubinfo/documents/Jury InnovationsFinalReport.pdf.

The Court seeks your committee's assistance with the implementation of several of the recommendations approved by the Court and refers for your committee's consideration several other recommendations. First, in connection with recommendation 7 (Standardized Juror Questionnaires), the Court agrees with the Committee's analysis that using standardized questionnaires can provide a uniform inquiry of jurors, promote streamlined juror examination, and provide more insightful information by enabling jurors to answer questions in a more

APPX D-1

reflective and relaxed atmosphere. The Court would like your committee to review form 1.984 (Juror Voir Dire Questionnaire), and recommend amendments necessary to update that form in accordance with recommendation 7. In making its recommendation, the committee should consider the enclosed sample forms submitted by the Trial Lawyers Section of The Florida Bar. The Court would like your committee to review recommendation 26 (Written Jury Instructions) and submit a proposed rule if the committee determines a rule is warranted. If the committee determines no rule is in order, please explain the committee's reasoning in your report. The Court also would like your committee to consider recommendation 31 (Final Instructions Before Closing Arguments), which the Court approves in concept, and propose any amendments the committee believes are warranted. The committee should feel free to propose any amendments that it determines are necessary to implement the other recommendations approved by the Court, as outlined in the enclosed chart.

The Court is also referring several other recommendations to your committee for either recommendation or further study. The Court would like your committee to consider and submit recommendations to the Court concerning recommendations 16 (Questions by Jurors), 17 (Discussion of Evidence Prior to Deliberations), 21 (Deposition Summaries), 22 (Expanding Use of Depositions in Civil Cases—100 Mile Rule), 23 (Juror Notebooks), 33 (Read-back of Testimony), and 35 (Less than Unanimous Verdicts). Although a majority of the Court voted against implementation of recommendation 17, which would allow jury deliberations prior to verdict in civil cases only, the Court refers this proposal in the event the committee concludes the proposal merits further consideration by the Court. If the committee favors recommendations 16 or 17, its report should contain proposed rules implementing those recommendations. In connection with the other recommendations, the committee may submit in its report to the Court any amendments it believes are warranted. Finally, the Court refers to your committee for further study recommendations 9 (Expedited Trials), 13 (Pre-voir Dire Judicial Statements), and 14 (Pre-voir Dire Opening Statements by Attorneys). In connection with recommendation 9, at this time the Court declines to adopt a rule requiring attorneys to notify their clients in writing of the applicability of the expedited trial procedure afforded in section 45.075, Florida Statutes. Your committee should take whatever action it deems appropriate regarding these recommendations.

Your committee should give the matters referred for proposed amendments or recommendations expedited consideration and report back to the Court with its recommendations by May 1, 2004. Your original report should be filed with the Clerk's office, with a copy to Justice Wells, Liaison to the Jury Innovations Committee, and Deborah Meyer, the Director of Central Staff. If you should determine that more time is required to submit your report, please file a motion for extension of time with the Clerk's office.

APPX D-2

Thank you in advance for your attention to this matter. If you have any questions, please do not hesitate to call me or Justice Wells.

Sincerely,

Harry Lee Anstead

HLA/CTW/DM/pb

Enclosures

cc: The Honorable Charles T. Wells, Liaison, Jury Innovations Committee
The Honorable Robert L. Shevin, Chair, Jury Innovations Committee
Ms. Madelon Horwich, Bar Staff Liaison, Rules of Civil Procedure Committee
Ms. Deborah J. Meyer, Central Staff Director, Florida Supreme Court
Mr. Tom Hall, Clerk of the Florida Supreme Court